IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

MONDAY, THE 26TH NOVEMBER 2007 / 5TH AGRAHAYANA 1929

WP(C).No. 21977 of 2007(N)

PETITIONER:

PALA MARKETING CO-OPERATIVE SOCIETY LTD.
P.B.NO.33, PALA, KERALA,
REPRESENTED BY ITS MANAGING DIRECTOR.

BY ADV. SRI.BECHU KURIAN THOMAS

RESPONDENTS:

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1. UNION OF INDIA,
REPRESENTED BY SECRETARY,
MINISTRY OF FINANCE, O.T.DIVISION IV FLOOR,
JEEVAN DEEP BUILDING, PARLIAMENT STREET,
NEW DELHI.

2. CENTRAL BOARD OF DIRECT TAXES,
NEW DELHI.

3. COMMISSIONER OF INCOME TAX,
KERALA.

4. JOINT COMMISSIONER OF INCOME TAX
(ASSESSMENT), SPECIAL RANGE, KOTTAYAM.

R1 BY ADV. SRI.P.PARAMESWARAN NAIR,ASST.SOLICITOR
R2 TO 4 SRI.GEORGE K. GEORGE, SC FOR IT

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

P1: TRUE COPY OF ADVANCE TAX RECEIPTS ISSUED TO THE PETITIONER.

P2: TRUE COPY OF AUDIT REPORT IN FORM NO.3CA ISSUED BY CONCURRENT AUDITOR DT.28.1.2000.

P3: TRUE COPY OF ORDER DT.28.1.2000 ISSUED BY THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETY (AUDIT) KERALA.

P4: TRUE COPY OF FORM NO.2 DT.1.2.2000 SUBMITTED BY PETITIONER.

P5: TRUE COPY OF CLAIM FOR REFUND OF TAX DT.20.12.99 SUBMITTED BY PETITIONER.

P6: TRUE COPY OF ORDER DT.1.8.2000, ISSUED BY R4.

P7: TRUE COPY OF PETITION DT.MARCH 2001 FILED BY PETITIONER BEFORE R2 (CBDT).

P8: TRUE COPY OF WRITTEN SUBMISSION FILED BY THE PETITIONER DT.16.5.2006.

P9: TRUE COPY OF ORDER DT.17.11.2006 ISSUED BY RESPONDENTS 1 AND 2.

TRUE COPY

PA TO JUDGE

C.N.RAMACHANDRAN NAIR, J.

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W.P.(C) No.21977 of 2007

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Dated this the 26th day of November, 2007.

JUDGMENT

The petitioner is a co-operative society stated to be engaged in marketing agricultural produce of its members. Even though society was entitled to exemption from income tax during the assessment year 1997-98, it remitted an advance tax of Rs.10 lakhs during the accounting year. Besides this, an amount of Rs.47,957/- is recovered by others from petitioner's bills towards tax deduction at source. The petitioner's audit is done by auditor appointed under Section 63(4) of the Kerala Co-operative Societies Act, 1969. Invariably the statutory audit is delayed and in this accounting year also, petitioner's audit was completed only on 28.1.2000. After completion of audit, petitioner filed return claiming refund of advance tax and TDS remitted by others through Ext.P5 application. The Assessing Officer rejected the return as time barred and consequently declined refund. However, petitioner filed application under Section 119(2)(b) of the Income Tax Act before the Central Board of Direct Taxes for condonation of delay in filing the refund application. The Board though heard the petitioner, rejected the same vide Ext.P9 against which this W.P. is filed. I

heard counsel for the petitioner and Standing Counsel appearing for the respondents.

2. The petitioner's case is that petitioner was prevented from filing the return of refund in time on account of delay in completion of statutory audit and besides this, if refund is rejected, the same will affect petitioner's financial condition causing genuine hardship to it. Counsel for the petitioner submitted that society has suffered heavy losses in the immediately succeeding five years. Counsel for the petitioner relied on the decision of the Karnataka High Court in A.BALAKRISHNAN V. G.M., H.M.T. LTD. (2007) 290 ITR 227 and contended that a belated return under Section 139(1) or 139(4) has to be considered on merits and the same cannot be rejected as time barred. Standing Counsel rightly pointed out that the decision does not refer to the relevant provisions on refund which are covered by Chapter XIX of the Income Tax Act. The scheme of refund under this Chapter provides in Section 239(1)(c) that a claim of refund has to be made within one year from the last date of the relevant assessment year. Counsel for the petitioner submitted that when refund is claimed through a return, the process of assessment has to be completed as provided under Chapter XIV of the Income Tax Act. Even though a claim for refund made by filing a regular return involves assessment to determine liability, it

cannot be said that the exercise is a regular assessment as contemplated under Chapter XIV of the Act. Section 139 provides for filing of return by assessees who declare themselves liable for payment of tax. Besides this, certain categories of assessees are required to file return only for the department to ensure that there is no escapement of assessable income. In other words, Chapter XIV is mainly oriented to ensure assessment and recovery of tax to protect the interest of the Revenue. On the other hand, Chapter XIX provides for refund and an application in this regard can be entertained only if it is filed within the time limit prescribed under Section 239 of the Act. In other words, if delay is not condoned by the Board under Section 119(2)(b), such application cannot be processed under Section 139 (1) or 139(4) of the Act. I am therefore of the view that in order to consider belated return for refund on merit, delay has to be necessarily condoned by the Board under Section 119(2)(b) of the Act.

3. The next question to be considered is whether Ext.P9 order is tenable or not. Counsel for the petitioner contended that even though petitioner has explained delay and substantiated their hardship, the Board declined to condone delay in exercise of it's powers under Section 119(2)(b) of the Act. Standing Counsel referred to Circular No.670 dated 26.10.1993 and proceedings of the Board F.No.225/208/93 dated 12.10.1993

whereunder four situations for condonation of delay are laid down by the Central Board as guidelines for them and the Assessing Officers to exercise powers under Section 119(2)(b) of the Act. Since refund claimed by the petitioner is amount of advance tax paid and TDS recovered and remitted by others, petitioner's is a case falling under the said guidelines. Besides this, Section 119(2)(b) authorises the Central Board to condone the delay among other things in entertaining a return if it considers it desirable or expedient to do so for avoiding genuine hardship for the assessee. For easy reference Section 119(2)(b) of the Income Tax Act is extracted hereunder:

> "S.119(2) Without prejudice to the generality of the foregoing power:-
>
> (a) .....
>
> (b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income-tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law."

Standing Counsel referred to the Division Bench judgment in TEA CONSULTANCY & PLANTATION SERVICES (INDIA) PVT. LTD. V. UNION OF INDIA AND OTHERS (2005) 278 ITR 356, wherein it was

held that Section 119(2)(b) is a virtual incorporation of Section 5 of the Limitation Act which is not barred by Income Tax Act. Even though courts while considering application for condonation of delay under Section 5 of the Limitation Act may be justified in considering the merits of the case and consequences to the party for non-consideration of the case on merits, I do not think Section 119(2)(b) is just an incorporation of Section 5 of the Limitation Act. What is stated in Section 119(2)(b) is that if the Board considers desirable or expedient for avoiding genuine hardship to the assessee, it should condone the delay. In other words, what the Board should consider is hardship to the party if delay is not condoned. The Board should condone the delay if failure to condone the delay causes genuine hardship to the assessee, no matter whether the delay in filing return is meticulously explained or not. Strangely the Board has stated in it's order that it is not possible to investigate (scrutinise) the return of income because the statutory time limit has already elapsed. I do not know on what basis this statement is made because even in a case where claim of refund is made, the Assessing Officer has to examine the liability for income tax of the petitioner and refund is made only if tax is not payable or the amount paid is in excess of the tax, interest, etc., payable. In other words, once the Board allows the application under Section 119(2)(b) of the

Act, the matter goes to the Assessing Officer for considering assessee's claim for refund under Section 237. Section 237 makes it clear that the Assessing Officer while considering application for refund should consider the amount of tax chargeable on the claimant under the Act and refund arises only if payment is in excess of the tax payable under the Act. In other words, the Assessing Officer has powers of assessment under Section 237 while considering an application for refund. Refund is payable only if it is in excess of tax and other amounts payable under the Act. In other words, an assessee who escapes assessment invites assessment if an application for refund is made under Section 237.

4. So far as the merits of the assessee's claim for condonation of delay is concerned, I find the assessee is bound to get it's accounts audited under Section 64 of the Co-operative Societies Act. The delay in audit by the auditor appointed under the Act is not attributable to the assessee. Even though Standing Counsel submitted that assessee was free to get the accounts audited by any accountant defined under the Act, I do not think this contention can be accepted because audit covered by other statues are recognised under second proviso to Section 44A(b) of the Income Tax Act. Until 2001 audited accounts and report in the prescribed form could be filed through the statutory audit. However, only from 1.4.2001 report from

auditor is required and even thereafter the audit report prepared by auditor appointed under the special statute could be submitted. Besides showing sufficient cause for delay in filing the return for refund, assessee has also established his case of genuine hardship in as much as it has suffered losses in the five succeeding years. The genuine hardship contemplated under Section 119(2)(b) obviously is financial hardship caused to the assessee if delay is not condoned. If delay in this case is not condoned, the co-operative society will be deprived of Rs.10 lakhs and odd which it was otherwise not liable to pay by virtue of the exemption claimed under Section 80P of the Income Tax Act. In the circumstances, I quash Ext.P9 declaring petitioner's entitlement for condonation of delay under Section 119(2)(b) of the Act and consequently direct the 4th respondent to process petitioner's claim for refund under Section 237 and grant refund to the extent found eligible within a period of three months from the date of production of copy of this judgment by the petitioner.

C.N.RAMACHANDRAN NAIR
Judge

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